

Subject to approval by the Interim Committee

**MINUTES
EXPANDED NATURAL RESOURCES INTERIM COMMITTEE
OCTOBER 14, 2004
9:30 A.M.
BOISE CITY COUNCIL CHAMBERS, CITY HALL
BOISE, IDAHO**

The meeting was called to order at 9:40 a.m. by Cochairman Senator Laird Noh. Other committee members present were Cochairman Representative Dell Raybould, Senator Dean Cameron, Senator Don Burtenshaw, Senator Stanley Williams, Senator Joe Stegner, Senator Bert Marley, Representative Bert Stevenson, Representative JoAn Wood, Representative Scott Bedke, Representative Mike Moyle, Representative Jack Barraclough, Representative Chuck Cuddy and Representative George Eskridge. Senator Robert Geddes, Senator Skip Brandt, Senator Clint Stennett and Representative Wendy Jaquet were absent and excused. Ad hoc members present were Senator John Andreason, Senator Brad Little, Senator Gary Schroeder, Senator Tom Gannon, Senator Shawn Keough, Senator Marti Calabretta, Representative Darrell Bolz, Representative Tim Ridinger, Representative Eulalie Langford, Representative Wayne Meyer, Representative Pete Nielsen. Senator Brent Hill, Senator Dick Compton, Representative Maxine Bell, Representative Larry Bradford, Representative Lawrence Denney, Representative Doug Jones and Representative George Sayler were absent and excused. Non-committee legislators present were Representative Frances Field and Representative Jim Clark. Staff members present were Katharine Gerrity and Toni Hobbs.

Others present were Lance Bates, City of Twin Falls, Lynn Tominaga and Brenda Tominaga, Idaho Ground Water Appropriators; Les MacDonald, City of Moscow, Larry Pennington, North Side Canal Company; Bill Thompson, Minidoka Irrigation District; Director Toni Hardesty, Barry Burnell, Dave Horland and Mark Mason, Department of Environmental Quality; Joe Jordan, Idaho Water Resources Board; Rex Minchey, Jerome Cheese/North Snake Ground Water District; Director Karl Director Dreher, Hal Anderson, Dave Tuthill, Idaho Department of Water Resources; Allyn Meulman, Bureau of Reclamation; Rick Evans, Qwest; Gayle Batt and Norm

Semanko, Idaho Water Users Association; Doug Conde, Attorney General's Office/Department of Environmental Quality; Della Johnson; Bruce Smith, Moore Smith Buston Turke; Charles Coiner, Twin Falls Canal Company; Nicole LeFavour; Dick Rush, Idaho Association of Commerce and Industry; Brent Olmstead, Milk Producers of Idaho; Judy Bartlett, Idaho Farm Bureau Federation; Scott Bybee and Robert Culver, City of Jerome; Randy MacMillan, Clear Springs Foods; Ted Whiteman, Jerome Cheese Company; Linda Lemmon, Thousand Springs Water Users Association; Thorleif Rangen, Rangen, Inc.; Bob Esterbrook, American Falls #2; Lynn Harmon, American Falls Recharge District #2; Russell Westerberg, PacifiCorp; Roger Seiber and Jerry Deckard, Capitol West; Marcia Minicucci, Boise Parks and Recreation; Bob Meinen, Idaho Department of Parks and Recreation; Dean Sangrey, State Parks; Tom Arkoosh, Arkoosh Law Office; David Suchan, Magic Valley Ground Water District; Mike Nugent and Ray Houston, Legislative Services Office; Levi J. Holt, Nez Perce Tribe; Mike Freese, Senator Larry Craig's Office; Michael Creamer, Givens Pursley; Garr Wayment, Southwest Irrigation District; Paul Isaacson, City of Wendell; Stan Boyd, Idaho Cattle and Wool Growers; Christian Petrich, SPF Water Engineering; Dar Olberding, Idaho Grain Producers; Suzanne Schaefer, SBS Associates, LLC.; Neil Colwell, Avista Corp; Jane Gorsuch, IFA and Matt Wilde, Boise City.

The Cochairmen explained that meetings have been held throughout the state with water users, county officials and government officials to enlighten them on the scope of the current situation and the potential cost to the entire state and the economy if nothing is done. **Representative Raybould** stated that these meetings were well attended and that the response to the information was good. Proposals are being developed to help solve water problems in the various aquifers throughout the state. He voiced continued concern that people in some aquifer areas continue to believe there is no problem. Another concern is the financial impact to the state and state revenues if these problems, especially in the Eastern Snake Plain Aquifer, are not addressed. The impact of not reaching a solution in this area would be very hard on the southern and eastern Idaho economies as well as on the state.

Senator Noh commented that there was some concern regarding agency rules that were proposed this summer that contained the word "recharge." He said that the Department of Environmental Quality has assured the legislature that these rules do not apply to agricultural waters or recharge that is being discussed by this committee. He noted that yesterday some committee members discovered there are DEQ "guidelines" being circulated. These are not legal rules that go through legislative review. Until yesterday, legislators were under the impression that concerns they were hearing from water users revolved around proposed rules.

As a result, **Toni Hardesty, Director of DEQ**, was introduced to explain both the rule and the guidelines in question. **Ms. Hardesty** stated that the proposed rules apply

to municipal wastewater land application permits. The purpose of the rule making was to add an additional class of treated wastewater so that the treated wastewater could be reused for things such as aquifer recharge, residential irrigation, toilet flushing, water features and car washes. The rule applies to municipal wastewater not agricultural or surface waters. The rule was proposed because developers, consultants and municipalities expressed interest in being able to treat water to a higher level so that it could be reused. The rule is ready to go to the board for approval at the end of October. **Ms. Hardesty** explained that since the rule establishes better uses for treated wastewater, it also requires more stringent treatment of the water. In order to use highly treated wastewater, a facility must be able to demonstrate technical capacity, financial capacity and managerial capacity.

Ms. Hardesty introduced **DEQ employee, Barry Burnell** to explain the recharge guidelines. She noted that the guidelines are on the DEQ website and that the public comment deadline has been extended until November 30, 2004. **Mr. Burnell** stated that the recharge guidelines in question have been under discussion for about three years, primarily with the Idaho Department of Water Resources, as different proposals for recharge activities have been received. With the action that this legislative committee is taking, and with the possibility of seeing recharge projects next spring, **Mr. Burnell** said that it was important for DEQ to develop guidelines for the existing rule.

There is a DEQ Water Quality Standards rule that addresses monitoring programs for wastewater and recharge projects. That rule, adopted in 1984, requires that a ground water monitoring program be approved by DEQ. When people have proposed recharge projects, DEQ has been frequently asked what a ground water monitoring program is. In order to help people prepare a ground water monitoring program, DEQ developed the guidelines.

Mr. Burnell clarified that the purpose of the guidelines is to assist those interested parties in developing ground water monitoring programs. The ground water quality act and the ground water quality plan have very specific policies that address ground water recharge. DEQ and the Idaho Department of Water Resources are directed to work cooperatively so that proposed recharge projects are consistent with both the plan and the act. **Mr. Burnell** noted that one of the directions in the ground water quality monitoring policy that deals with aquifer recharge directs DEQ to develop guidelines to develop management practices and to develop rules that ensure that artificial groundwater recharge projects will comply with the ground water quality plan.

Mr. Burnell explained that the guidelines are not for wastewater land application as **Director Hardesty** discussed. **Mr. Burnell** said that **David Blew's** presentation to the

committee regarding managed recharge included a topic on monitoring. The guidelines are designed to develop ground water monitoring programs that will demonstrate projects will not have adverse effects on ground water quality.

Representative Raybould voiced concerns of irrigators regarding recharged irrigation water. Every canal in the state, unless it has to be lined, provides recharge. He asked, in the event a canal company or individual farmer constructs a pond or area where wastewater can collect and seep into the ground, whether that will be classified as a recharge site. He also asked, with regard to management and monitoring programs, how they will apply to irrigation facilities, structures and waterworks that have been in place for many years. In **Representative Raybould's** opinion, the concern of the agricultural community is that the guidelines will require every canal to have a management program that has to be approved and monitored. **Mr. Burnell** answered that the guidelines were not intended to be applied to all of the canals and irrigation waterworks that are in existence. The guidelines are for those specific areas where managed recharge projects are being done, such as the Lower Snake River Recharge District. **Mr. Burnell** said the guidelines would apply to surface waters being used for managed recharge due to the concern of bacterial quality. He added that the guidelines were not intended to apply to individual farms but to large managed recharge projects.

Representative Stevenson commented that the Mid-Snake Recharge District currently has monitoring that has been in place for a number of years. He asked if the guidelines will require changes or additional monitoring wells in those projects. **Mr. Burnell** said that, in his opinion, DEQ would need to decide if the current monitoring wells and procedures are adequate to meet the requirements of the guidelines. In response to another question from **Representative Stevenson**, **Mr. Burnell** said that grandfathering existing recharge sites has not been discussed.

Senator Williams asked if DEQ sees any difference between the quality of water as it goes down a canal system and seeps into the ground and that same water being diverted out into a particular recharge site. **Mr. Burnell** said water quality does not change unless there is a spill of some sort. The difference is when the water is directed to a single basin and added year after year in that same location. It has been shown that wells that are under the influence of surface water have contaminants in them that will make people ill. He added that DEQ is not interested in applying the guidelines to a diverse application or leakage of water through irrigation, but rather to those specific locations where large quantities of water are added with the intended benefit of recharging the aquifer. He clarified that they are more focused on specific areas of recharge rather than volume.

Representative Meyer asked if the guidelines include any standards and if so, are they different from what is currently being used. **Mr. Burnell** answered that the

guidelines include a list of maximum contaminate levels for drinking water as a gauge to measure the recharge project against. He added that what is listed in the guidelines are current standards for drinking water.

Representative Langford asked for examples of existing or proposed projects in the state that would be considered large projects. **Mr. Burnell** explained that in May a tour was taken of south central Idaho to look at areas that **David Blew, Idaho Department of Water Resources**, has identified where recharge projects would have a high likelihood of occurring.

In response to a question from **Representative Barraclough** regarding distance between a recharge site and the nearest drinking water well, **Mr. Burnell** explained that the location of a recharge project and aquifer dynamics and characteristics that are present are part of the materials requested to be presented with the ground water monitoring program. This information is required so those interested in conducting the recharge project can demonstrate what the area of influence is going to be from that recharge project. In his opinion, through those site specific studies, the extent of monitoring programs will then be outlined. He noted that one concept that has been identified is that if a site has safety or filtration features associated with it as part of the recharge project, and hence there is a lower risk or less likelihood that the project will result in the contamination of ground water, there should be fewer monitoring requirements.

Representative Raybould said that, in his opinion, the biggest issue involves the definition of a recharge area that includes irrigation practices. He suggested that DEQ send a copy of the guidelines along with a letter explaining the extension of time for public comment to the various irrigation districts and people in the state so they are aware of what is happening.

Senator Andreason stated that he still has concerns as to why DEQ felt it was necessary to establish guidelines, that are not subject to legislative review, separate from rules. **Mr. Burnell** explained that these guidelines were established to provide guidance not to be a prescriptive approach. Guidelines were one direction they were given to take on these types of projects. In his opinion, the guidelines were developed to help interpret the water quality standards and ground water quality rule. **Director Hardesty** added that the guidelines will be used for very site specific analyses and each site will be different. In her opinion, guidelines provide more flexibility. In response to another question from **Senator Andreason**, **Mr. Burnell** said that the rule is what needs to be complied with and how to get to that is the purpose of the guidelines. There is no requirement that the guidelines must be used, it is just meant to be helpful in terms of what is required in order to get a project approved. The guidelines do not have the force and effect of law.

Senator Cameron asked what the position of DEQ would be if an entity was attempting to do recharge and did not follow the guidelines. **Mr. Burnell** explained that this entity would be asked to submit a ground water monitoring program plan to DEQ that would demonstrate that they were being protective of ground water quality. He continued that the guidelines provides DEQ with more flexibility on how it is applied than a rule would. In response to another question from **Senator Cameron**, **Ms. Hardesty** explained that the rule requires DEQ to approve a monitoring plan. People then come to DEQ and ask for guidelines for what is needed for that plan. These guidelines were established for that purpose. People do not have to follow the guidelines exactly in order to qualify.

Senator Cameron asked what would prohibit DEQ from adjusting the guidelines down the road to make them more stringent. **Director Hardesty** said that if it was discovered down the road that the guidelines needed to be adjusted or revised, a period of public comment would be established so people would be aware of what was happening and they would be allowed to comment on the changes, just as they are with these guidelines.

Director Dreher stated that while he was aware that the guidelines were being established, it was not on his radar screen as a potential problem. He said that in reading through the guidelines, he does have some concerns and thinks the extension of the public comment period will be helpful. He offered to work with **Director Hardesty** to work through some of the issues. He suggested that in lieu of guidelines, the two agencies could work together to develop monitoring plans for two representative recharge projects in order to have concrete examples of monitoring plans.

Representative Meyer stated that if the guidelines are to be referenced in the rule itself, they will have the effect of law. **Mr. Burnell** said that he does not believe the guidelines will not be referenced in the rule.

Representative Stevenson said that in reviewing the guidelines, the reference to “irrigated agriculture,” “ lagoons” and “ponds” gives the impression that this is all encompassing and suggested the wording be looked at. He asked if someone has a lagoon that has already been approved by DEQ, do these requirements mean they will have to go through yet another approval process. **Director Hardesty** said that these guidelines were not meant to be all encompassing and agreed that there is a need to review at the language of the document. There was no intention on the part of DEQ to include small individual operations in these guidelines.

Senator Andreason stated that he was still concerned that the guidelines seem to be an attempt to circumvent the legislative review process that rules undergo. **Senator Noh** agreed that the communication regarding the guidelines was not as

good as it should have been. On the other hand, in his opinion, this was an attempt on the part of DEQ and Idaho Department of Water Resources to move the recharge process along and he commended them for that attempt.

Mr. Bob Meinen was introduced as the new director for the Department of Parks and Recreation.

After noting Michael Bogert's departure from the Governor's Office to private practice, **David Hensley** was introduced as acting counsel to the Governor.

Mr. Wayne Hammon, U.S. Farm Service Agency, was introduced to give an update relating to the Conservation Reserve Enhancement Program (CREP). **Mr. Hammon** stated that since the last meeting of the Committee a working group had been formed to work on the proposal itself. The goal of this working group is to provide a first draft of the written proposal the state is required to submit to Secretary Venemen. That draft will be given to the expanded committee for finalization before it is submitted to the Governor. The working group includes about 75 different organizations with draft documents being sent back and forth through e-mail. Members include water users, water appropriators, Farm Bureau, Grain Producers, Cattlemen, Ducks Unlimited, Pheasants Forever and Idaho Rivers United.

Two smaller groups have also been formed. The first is a wildlife/conservation group that has been working on what needs to be done to make that land into wildlife habitat once it is taken out of production. The other group is a water management group made up of Mr. Hammon, Director Dreher, Clive Strong and other water entities of state government. This group is working on the specifics of the water management portion of the program.

Mr. Hammon explained that the program includes more ground than it did last month. The first change involves including the entire hydrological unit since that is how people are going to be paid for the water. Another change involves inclusion of the Elmore County Aquifer area.

Mr. Hammon noted that, given the fact that farmers will be paid a fair amount of money, the Farm Service Agency anticipates that more land will be offered than the limit of 100,000 acres. As a result, they have developed a ranking sheet to allow prioritization of requests for land retirement. This ranking sheet will be changed regularly as new areas are identified. Currently the ranking sheet reflects the goals as outlined by the Idaho Department of Water Resources in securing water that is in the aquifer, not necessarily surface water.

Mr. Hammon explained that several major problems have surfaced regarding the

CREP program. One problem involves the need for a match. The state needs to come up with, through all of its partners (water right groups, state agencies, industry, etc.) with 20% of the cost of the program. In looking at the plan, they believed that the state already met that requirement through expenditures to the overall water plan. After sending that information back to the national office, they agreed that everything listed looked like possible matches. However, they questioned the fact that the state has not contributed any actual cash and all of the money that landholders will receive would be coming from the federal government. **Mr. Hammon** said that he will be meeting with the national office to discuss this factor and make the case that what Idaho has been doing should count as the match.

If the state is required to contribute actual cash, the current thinking of the working group is to take the money from the ground water districts. The problem with this approach, however, is that if someone is not in a ground water district, there would be no match and the land would not qualify for CREP.

Another problem relates to surface water. It is very easy to capture water savings for ground water but it is much more difficult with a large surface irrigation project. **Mr. Hammon** explained, for example, that the Northside Canal Company is a large area the irrigates much of the state but if someone takes their land out of production in that area and does not use his shares, it is the canal company's practice to redistribute that water to other existing shareholders. At the end of the day, the same amount of water gets used, it is just used on someone else's farm. That is a concern because it is difficult to demonstrate environmental benefit which is the purpose of CREP. **Mr. Hammon** said that the current thinking and the easiest way to do it is to exclude surface water from the area if they are diverting water from the Snake River. It is very important to the wildlife partners that some surface area be included along the tributaries, specifically the Big Lost, Little Lost, Big Wood and some other small tributaries. In most of those cases the diversions are much smaller and are easier to monitor. This is being worked on with cooperation from **Director Dreher and his staff** and should be worked out by the next meeting of this Committee.

Mr. Hammon stated that a working draft of the proposal has been started with help from the Attorney General's Office. People from the Farm Service Agency, Natural Resources Conservation Service, Idaho Ag-statistical Service, Idaho Department of Agriculture, the University of Idaho Extension Service, Idaho Department of Water Resources, the Bureau of Reclamation have been assigned specific parts of this proposal. The draft should be available to the committee by the next meeting so that it can be shared with constituents throughout the state for comments and improvements. It is the hope that the CREP program will be ready to go by next summer/early fall.

In response to a question from **Representative Stevenson** regarding the payment limit per person, **Mr. Hammon** said that there is a \$50,000 per person payment limit and would include any CRP payments being received. It would not include any other federal payments being received.

Representative Nielsen asked whether the 30,000 af of water that is being used per year in Basin 61 in the Mountain Home Aquifer was included in the 150,000 af total goal and will special consideration be given to this area due to the extent of the problem. **Mr. Hammon** said that the current philosophy of the working group was to limit CREP enrollment in each county to 50% of the CRP eligibility. In Elmore County that would allow slightly over 18,000 acres to be enrolled. That can be revisited.

Senator Williams asked for clarification of how the ranking sheet will be used. **Mr. Hammon** explained that the land that is highest ranked on the ranking sheet will be enrolled first and then they will work down. He noted that the counties are not ranked for priority but the closer they are to the river, the more points will be allowed. He added that once the per county limit of 50% is reached, regardless of points on the ranking sheet, a farm with fewer points located in another county will then be enrolled.

Representative Langford asked if the area identified as eligible for the CREP is the only area in the state that will be eligible. **Mr. Hammon** said that the area that has been identified is the only one being considered at this time. The entire state can be made eligible but the working group's recommendation is that this area is large enough to begin with. If the program is successful, it is possible to establish similar programs in other parts to the state.

In response to a question from **Representative Bedke** regarding the ranking sheet, **Mr. Hammon** explained that it is believed that the national office is going to require some type of match from the state and currently it is believed that the ground water districts will take care of that match. For surface irrigators or someone not inside a ground water district, the match has to come from somewhere else. It has been suggested that the wildlife groups provide that match. This line was included on the ranking sheet so that people will realize that some type of match is being required. **Mr. Hammon** noted that he is not sure how big of a problem this will be but that people need to be aware of it.

In response to a question from **Senator Marley** regarding the map of land included in the CREP, **Mr. Hammon** explained that currently Bannock County is barred from being included in the program due to enrollment in the CRP program. It could be included at a later date.

Senator Noh commented that, in his opinion, this program is important to the state because it provides incentive to retire land voluntarily that will provide water to the state as opposed to the state having to pay to acquire water above Hells Canyon.

Senator Burtenshaw noted that a program such as this where ground water is retired would actually retire more water than 150,000 af due to the fact that nothing would be lost through seepage. It would also be less expensive than running the water down a ditch to get it to a recharge area. He added that he would like to see the person who is retiring their land get more for actually leaving wet water in the aquifer. The money from this program needs to be used for land that retires wet water, not questionable ground and this needs to be understood. In his opinion, this is the cheapest water that the state can purchase and if all other sources of funding for the match fail, the state needs to step up and contribute what is necessary.

Senator Cameron agreed with Senator Burtenshaw and stated that the state is going to have to purchase water to solve this problem. He emphasized that it is a statewide problem and the effects of not solving this on the entire economy and the state budget will be great. Not solving this problem could result in a \$50 to \$100 million hit to the state general fund and that is just the first round. He added that the CREP program will not solve the entire problem but it will definitely help. This program will provide a way to leave water in the aquifer and provide additional habitat for wildlife. In his opinion, that is a win-win situation.

If, as is hoped, that the money that is currently being spent on general fund appropriations for the Idaho Department of Water Resources and others can count as in-kind contribution and be considered the 20% match that is required, the effect to the general fund is minimal, if anything. **Senator Cameron** continued that even in a worse case scenario where the state has to put up hard cash for the 20% match, that will only be \$2.5 to \$3 million of the state's general fund.

Senator Cameron made a motion that this committee support the efforts of the working group on the CREP program up to 100,000 acres and that state resources be provided, in-kind or otherwise, to move that program forward as rapidly as possible. Senator Burtenshaw seconded the motion.

Mr. Hammon said that he will be meeting with the national office in Washington, D.C. regarding this program and that it is his intention to tell them of the Committee's support. He also plans to negotiate the lowest cost to the state possible. It is his honest belief that the state has spent a large amount of money in monitoring, modeling and so on that should count toward the match.

Senator Burtenshaw suggested informing the Governor and others in the state to

make them aware of the CREP program and how it is progressing.

Senator Keough asked why the motion did not contain the expenditure range of \$2.5 to \$3 million. **Senator Cameron** explained that before the state commits to a dollar amount, in his opinion, we need to wait for **Mr. Hammon** to come back from Washington, D.C. with their requirements. In the motion, he limited it to 100,000 acres and if you do the math backward with the 80% match, it is very close to \$3 million if the state has to fund the entire 20%. The hope is that the state will not have to put in any actual cash.

Representative Raybould agreed that this does provide a source of cheap water for the state to purchase but, that over 30 years, which is the length of the agreement with the Nez Perce, it becomes more expensive per acre foot and the state still does not own the water at the end. This needs to be taken into consideration. He said that another thing that should be considered is not that it is the cheapest water available but that it is water that will be applied at the right place at the right time.

Representative Nielsen said that he was in support of the motion but had concerns with the ranking system and how that will effect the Mountain Home area. He suggested adjusting the ranking system to fit each specific area.

Senator Stegner agreed with **Representative Raybould** that there are some drawbacks regarding that the state will, in effect, just be renting the water for 30 years. If there are water shortages in the state, this is not necessarily a recognition that the state needs to provide the water forever. This is taking care of the problem short term and when those contracts are up, the state will be facing the same dilemma of that water right being used for agricultural purposes that may again put tremendous pressure on the water supply within the state.

Representative Raybould agreed that this is a kind of stop-gap measure. On the other hand, if 50% of the 20% match can come from in-kind contributions, then for the 15 year period of the CREP contracts, the cost to the state is much cheaper for retirement of 150,000 af of water that goes directly to solving the immediate problem. In his opinion, this is a very good program that the state should embark on. He added that the motion does not obligate the state for any amount of money or for any length of time but just gives a recommendation that gives **Mr. Hammon** something to work with when meeting with the national office in Washington, D.C. Fifteen years will give the state some time to solve the other problems while currently we only have 12 months. **Senator Stegner** clarified that he was not objecting to the Committee expressing interest in pursuing the CREP program and to consider spending state resources to support that. He asked for clarification of the motion.

Representative Meyer said that as a former member of the Kootenai County ASC committee when the CRP program first started, it took several years to develop. It was not something that took off right away. In his opinion, 100,000 acres will not be added to the roles all in one year. This CREP program will probably be ongoing for possibly the next five or ten years before it is tapped out. **Mr. Hammon** said that, in his opinion, a significant amount of the land will be retired over a shorter period of time such as three years from the interest he has received since introducing the program. People that are looking down the road at water calls are much more willing to get paid for it than to just lose it.

Representative Bedke reminded the committee that this was just a motion to pursue the CREP program. He emphasized that the strawman proposal requires 600,000 to 900,000 acre feet of water be provided to make the water budget balance. This CREP program is just a piece of the solution. **Representative Bedke** said that the reason this program was looked at to begin with was because curtailment was part of the final solution. In his opinion, if the state can provide producers and citizens with an easier, less painful solution that is very important. This program, in a sense, makes curtailment voluntary.

Senator Cameron stated that after checking the motion, it does not lock anyone in to supporting this program down the road. He said that intention of the motion was to provide some support to **Mr. Hammon** as he goes back to Washington, D.C. and to get the ball rolling. Many people are anxious to get things going. He added that his motion purposely did not lock in a dollar amount but it was capped at 100,000 acres and that can be adjusted based on the program's success.

Senator Cameron continued that a long-term fix is the ultimate goal but that will take some time. In his opinion, the 15 years this CREP programs allows gives the state a fair amount of time to work on finding a long-term fix. In order to bring the water situation back into line, some property is going to have to be taken out of production. This will happen regardless of the CREP program. It is just a matter of how big of an effect that land retirement will have.

The motion carried unanimously by voice vote.

Representative Eskridge suggested that it is important that each legislator be able to go back to their constituents and explain to them the economic impact to the state economy, as well as the state budget, if nothing is done.

Director Dreher was the next speaker and addressed the Committee regarding the strawman proposal for the Eastern Snake Plain Aquifer. **Senator Noh** explained that the proposal has been circulated to the signators of the one year agreement which held in abeyance litigation over calls for water in the Hagerman area. The

agreement expires in March, 2005.

The proposal was also circulated to signators of a separate one year agreement that was signed by the senior surface water users that divert water at Milner Dam and primarily involves the North Side and Twin Falls Canal Companies and expires on December 31, 2004. The signators of the agreement agreed to withhold water calls and potential litigation.

Senator Noh noted that at the October 13 meeting in Burley of the ESPA Working Group it was discussed that the interested parties would be willing to enter into private negotiations amongst themselves on an expedited regular basis. The goal of these negotiations would be to try to reach an agreement hopefully by the end of November. **Senator Noh** added that the terms of the strawman proposal have broader implications than just the Eastern Snake Plain.

Director Dreher emphasized that the settlement principles contained in the proposal do not contain anything inconsistent with the prior appropriation doctrine of the state. He explained that since the prior appropriation doctrine was designed to deal with times of shortage, the Department can apply it as law if necessary. The difficulty in doing so revolves around the fact that junior priority water rights that are subject to administration have never been subject to this type of action. This is due, for the most part, to the fact that they were undecreed water rights and had only recently been decreed in the Snake River Basin Adjudication. Once a group of water rights is decreed, a petition can then be made to the SRBA court seeking authority for the Department to begin interim administration of those rights until the final decree is issued. **Director Dreher** said that gives him, as Director, the authority to establish water districts pursuant to Chapter 6 with water masters that administer water rights by priority. This is a recent occurrence for these junior water right holders and many of them have been in existence for 40 years or longer. Ground water rights in the Eastern Snake Plain have almost never been administered in this manner. Most of these systems were not designed with the idea of being reduced at some point.

Director Dreher continued that now these rights are subject to administration and while the prior appropriation laws provide an orderly means for allocating water during times of shortage, it is very harsh and comes with economic consequences. When the Director has to decide whether a junior water right is injuring a senior priority right, he cannot look and does not look at the economic value of using the water under the junior right versus the senior right. Curtailing virtually thousands of wells would have significant economic consequences, not only to people holding those rights but to the economy of the region and to the state and its general fund.

Director Dreher said that a better way to handle the situation would be to find a

framework around which people could reach some agreement. Such an agreement would need to provide some certainty to senior priority rights that there will be water available to an extent greater than what has been there. The agreement would also have to provide some certainty to the junior right holders that if certain things are done, there will be no curtailment. **Director Dreher** explained that part of this settlement framework is designed to propose something that could be considered as a mitigation plan that would do both of these things.

According to **Director Dreher**, another principle that the proposal is based on is that mitigation will be allocated based upon potential or actual injury or a surrogate for injury to senior priority water rights. In other words, it will not be possible to make everyone happy, there is not enough water. He explained that if this matter goes to litigation and a judge orders curtailment of all ground water rights junior to 1900, the maximum amount of water that will remain undiverted in the aquifer is 2 million acre feet. This is the amount of depletion that occurs to the resource due to consumption of ground water and that is the most a holder of a surface water right can get with a priority date of 1900. That is the most anyone can get. He continued that 2 million additional acre feet into the system will not necessarily fill all of the water rights that have been issued.

Director Dreher, in response to critics that say the water was over-appropriated, said he believes that opinion is uninformed. He reminded the group that Idaho has a constitutional provision that says that the right to appropriate unappropriated water shall never be denied. In 1950, when the issuance of ground water rights accelerated and interest began to grow to use spring discharges for aquaculture, there was unappropriated water. The state correctly allowed new entities to come in and appropriate the unappropriated water. The problem was that those appropriating the water did not fully recognize the character of the unappropriated water. That water was only there due to the actions of others, namely the surface water irrigators above Milner, that had gone on for decades. Decades of application of generous amounts of water raised ground water levels across the Eastern Snake Plain and spring discharges in the Thousand Springs Reach went from about 4,200 cubic feet per second to 6,800 cubic feet per second. The mechanism was not in place for the state to be able to guaranty that the generous application of surface water would continue. Since that time, according to **Director Dreher**, spring discharges have dropped to 5,200 cubic feet per second or less and ground water levels have dropped leaving the state in a situation where there are more water rights in existence than there is water to fill them.

In **Director Dreher's** opinion, this is not over-appropriation. He reminded the Committee that the base case scenario from the new ground water model showed that, except for the drought, the state was essentially at equilibrium. This means that the amount of ground water that was being withdrawn was in balance with

the amount of recharge occurring in the aquifer. It was not ground water rights that were being shorted nor were ground water levels dropping. It was the disappearance of the source of water that at one time was unappropriated and is no longer available. **Director Dreher** suggested the term over-allocation better reflects the failure to recognize the character of the source at the time.

Director Dreher said that regardless of how we got here, there are more water rights in existence than water to fill them and steps have to be taken to restore normal amounts between the rights that are authorized to divert and the available supply. One way or another, either through an agreement or administrative action involving curtailment, something must be done.

Director Dreher continued that another principle of the straw man proposal involves junior water right holders. He explained that if there is mitigation provided by the holders of junior priority rights, these holders need to have certainty that the level of mitigation is enough. A settlement cannot be made in which junior right holders commit to do certain things for a certain number of years and then have that changed down the road.

Director Dreher stated that acquisitions of water, such as through a CREP type program or otherwise, will be based upon the principle of willing buyer/willing seller basis. The state currently has eminent domain authority that potentially could be exercised to deal with some of the problem. He emphasized that is not what is being proposed. They believe that acquisitions should be on willing seller/willing buyer basis.

Director Dreher said that if this is going to work to the satisfaction of the holders of senior water rights, implementation targets need to be established and a mandatory process established for addressing any shortcomings. There has to be certainty that water right holders are going to get what the agreement says.

There also has to be a measure of the effectiveness of the actions that are taken. In **Director Dreher's** opinion, the best tool available to do this is the new ground water model. The new ground water model is the only thing available that allows segregation of the effects of individual actions.

Director Dreher commented that the state has some responsibility for where we are today and as such the state needs to take the ultimate responsibility of ensuring that whatever settlement is reached, that it is implemented fully.

Director Dreher went on to discuss the target of the positive shift in the water budget that they are trying to achieve. He went on to say that the target is 600,000 to 900,000 af on an annual basis. These numbers were not completely

arbitrary and they were determined by looking at a number of perspectives.

The first concerned what would happen if all of this goes to litigation, what is the most that the surface water users would gain. As **Director Dreher** said earlier, that would be 2.1 million af. Director Dreher continued that it is unlikely a judge would order curtailment of all ground water on the Eastern Snake Plain. It is possible some curtailment would be ordered. So, in **Director Dreher's** opinion, the amount of benefit that would be achieved through litigation has to be a number less than 2.1 million af. On the other hand, in litigation, ground water users have some arguments that include reasonable means of diversion, available storage, waste and full economic development that is called for under Idaho law. If they prevailed 100% on every argument, their outcome would be that they would not have to curtail. This is also unlikely to happen. **Director Dreher** said the 600,000 af floor represents the minimum that might be achieved through administrative action.

Director Dreher explained that in order to achieve this shift in the water budget there are three things that can be done. The first would be to manipulate or reallocate the available supply. The second would be to manage the available supply in a different manner than today and the third would be to bring about a reduction in demand.

Director Dreher said that in looking at the range of what appeared to be feasible and economically viable alternatives it is believed that through water supply initiatives, 350,000 af to 500,000 af of water could be acquired annually. This would be accomplished through the following actions.

First, there is some interest in having the state seek to acquire 200,000 to 260,000 af of natural flow or storage water rights above Hells Canyon Dam from willing sellers. **Director Dreher** said that high lift pumpers who are paying as much as \$250 per acre just to pump water to their land are interested in this possibility. The state could acquire those water rights to provide some economic relief to people who otherwise are struggling. In **Director Dreher's** opinion, if these people don't survive, the impact on the economic activity in their areas will be great. On the other hand, if the state secures those water rights, those individuals have some options. The option that seems to be favored is converting their land to grass rangeland. That may not have the same benefit to the area as irrigated land but it is better than nothing.

Another public policy implication, according to **Director Dreher**, is that at some point the water the state would acquire may become surplus to what it is presently needed. If this were to occur, and the water is acquired below Milner, that water could be exchanged for storage water rented from the Water District 01 rental pool for flow augmentation by the Bureau of Reclamation. This proposed exchange

would not be required when storage water would not otherwise be provided under the terms of the Bureau of Reclamation flow augmentation program. The 200,000 af below Milner could be exchanged, one for one, for water in storage. As a result, the ESA obligations would be met and there would be storage water available for dealing with the conjunctive administration issues that the state is facing.

Director Dreher stated that, at this point, the Governor has not authorized the Department to move ahead with any kind of acquisition. The Director has been meeting periodically with the Governor on the work of the Committee and the work efforts but no authorization has been given. Nonetheless, the state cannot afford to sit back and do nothing. Requests for proposals have been drafted that will be sent out in November, if the Governor gives his approval, seeking bids from holders of existing water rights that might be willing to sell their water to the state.

Director Dreher said that assuming this does go forward and these requests are sent out, it will allow the state to at least find out how much water is potentially available and at what cost. Nothing has been committed at that point. If a decision is made to accept some of those proposals, the most expedient tool available to pay for that is having the Idaho Water Resource Board issue revenue bonds for the acquisitions within one to two years. Acquisitions would occur on a staged basis over five years.

According to **Director Dreher**, repayment of the bonds would be determined based upon the benefits accrued. Water acquired to provide direct mitigation to senior priority right holders would be paid for by junior priority water right holders through an annual assessment for the life of the bonds. Water acquired to exchange would be paid for by a combination of assessments to water right holders benefitting from the ESA coverage and Bureau of Reclamation rental fees.

Director Dreher continued that the next area of water supply being looked at is a reduction of ground water depletions of 100,000 af through existing and future ground water to surface water conversions. This program is premised upon obtaining a reliable surface water supply to sustain the conversions over the long-term. The extent of reliability will be negotiated and actual benefits determined as the surface water acquisition program is developed. It is anticipated that the EQUIP program will be used to help fund the efforts. The conversions will be on a staged basis over five years with some of the conversions occurring over a second five year period.

The third aspect of the water supply component is a managed recharge program. According to **Director Dreher**, even though the issues with Idaho Power have not been resolved, they are resolvable to a limit. The program is not designed to in any way diminish Idaho Power's water rights. The managed recharge program would

be designed to provide an average annual benefit of 200,000 af, using primarily natural Snake River flows. The program would allow the use of existing canals to deliver the water to recharge sites. **Director Dreher** explained that the natural flows would come from the water that is released in the fall, in a good year, from the storage projects for flood control. An additional aspect of the natural flow would be part of the spring run-off that is not stored when storage is full. The Department anticipates that this recharge effort could be fully achieved within ten years.

Director Dreher said that the Department is hoping that consideration will be given to allow them to conduct a feasibility study in collaboration with other entities to make sure other water supply projects have not been overlooked. This study would be done over a two year time frame.

The next category of action that could be taken, as explained by **Director Dreher**, is water management. Through a combination of projects being developed a net reduction in demand on spring discharges in the Thousand Springs area of 100,000 to 150,000 af would be achieved. **Director Dreher** said that it is technically feasible, with proper consideration to water quality concerns, to take the effluent from some of the aquaculture facilities and either pump it back to be blended with unused water to achieve an enhanced supply or conveying that affluent to some other use that does not have the same water quality demands, such as irrigation. These projects would be finalized and authorized for construction within two years.

The last component would be reductions in demand. **Director Dreher** said that part of this would be through the CREP program that was discussed earlier but there are also other mechanisms available. Ground water districts have the authority to acquire lands within their own district that are irrigated with ground water and retire those lands. In **Director Dreher's** opinion, this may make sense where the grounds are marginal. There could also be some selected acquisition of spring water rights through the purchase of subordination agreements. This means that a senior water right holder would accept compensation and, in exchange, refrain from exercising his priority. According to **Director Dreher**, subordination agreements work quite well and are one mechanism of moving water of noncompeting uses to higher economic values still within the prior appropriation system.

Director Dreher said that the preliminary capital cost estimate, excluding annual land payments, is about \$80 to \$100 million and that may be low. He added that if the investment is going to be collectively made by the state and by holders of junior priority water rights and others, there has to be something in place to ensure that the actions that are taken and paid for accomplish what they are intended to accomplish. A component of the plan has to be enhanced monitoring and enforcement.

Director Dreher explained that such an on-going water measurement and monitoring program would entail:

- ▶ Updating the ESPA ground water model on a periodic basis;
- ▶ Continuing existing return flow measurements;
- ▶ Identifying or establishing sentinel observation wells for annual measurements of ground water levels and conduct mass ground water level measurements as necessary, probably not more often than every five years;
- ▶ Collecting continuous spring flow measurements on sentinel springs within certain specific reaches;
- ▶ Updating the water budget;
- ▶ Reviewing the Idaho Department of Water Resources tributary underflow study and developing and implementing a methodology to improve quantification of tributary underflow; and
- ▶ Developing and implementing a methodology for updating evapotranspiration. (NASA is suspending the thermal band on spatial imagery used by the Idaho Department of Water Resources for determining evapotranspiration.)

Director Dreher noted that continuing with the technical development of the ground water model is essential. The model is always being checked against what is being measured historically in order to be sure the model is not only agreeing with historic measurements but also to provide confidence that the projections being made are valid.

In conjunction with this, **Director Dreher** stated the framework proposes the continuation of the technical committee of hydrologists assembled to work on reformulating and recalibrating the ground water model. It is important that they continue to provide input on all of the technical activities. **Director Dreher** commented that this process has worked very well and is one that was intentionally designed when the appropriation for the development of the new ground water model was requested.

The next component, according to **Director Dreher**, that needs attention is the Department's accounting models for water that is diverted and used. These models are seriously outdated and need to be reviewed. The way they are currently

structured makes them prone to errors and they have not been updated for at least 20 years.

Director Dreher reiterated that enforcement needs to be addressed as part of the process. The state can not afford to have adversarial water masters that refuse to do their job, the system is not designed to work that way.

It is also proposed that the Water Board begin developing an aquifer management plan in consultation with affected water right holders within five years. This effort will include development of a domestic ground water use policy. According to **Director Dreher**, domestic wells in Idaho individually do not use a lot of water. It is supposed to be limited to 13,000 gallons per day. Domestic wells are the only kind of a water right in Idaho that can be established through a constitutional appropriation. There is no need to apply for a permit and there is no opportunity for people to protest the well. These people need to be included in the discussions. If incidental take coverage under the ESA is not shored up and the senior water right holders lose access to their storage, they will make a demand for delivery. If a demand is made, under Idaho law, constitutional use water rights are the first to be curtailed. These domestic well owners have some exposure and need to be included in the discussions.

Milestones for achieving the overall goal will be established with a process for corrective action or “off ramps” in the event that interim or long-term goals are not achieved.

The Interim Natural Resources Issues Committee will remain in place to monitor implementation of the framework and, in consultation with the stakeholders, make adjustments to the framework as necessary to ensure that overall goals are being achieved.

Director Dreher said that, in his opinion, this is a very good proposal. They are waiting for feedback from those that would be affected and he anticipates there will be a lot of discussion ahead. He stated that there needs to be some realization as to the limits of what the state can do. Feedback is very important. The proposal was developed to provide a starting point for reaching an agreement.

Director Dreher explained that the request for proposal (RFP) draft will be posted on their website as soon as possible. It is divided into four sections. The first section is the request, the second talks about eligibility for being considered, the third is the actual application form and the last section is the instructions.

Director Dreher noted that it has been recognized that funding is an essential component of the proposal and that a companion strawman proposal is being

developed for allocating the costs. He reminded everyone that the framework is not meant to be the final answer but is a starting point that will hopefully foster meaningful discussion between the parties and the state.

Senator Calabretta asked whether the funding proposal will also provide time lines similar to that of the settlement proposal. **Director Dreher** said that it would.

Representative Wood asked whether the domestic ground water use policy would also include municipalities and industrial uses. **Director Dreher** clarified that municipalities and industrial concerns hold water rights so they are already engaged in this process. Domestic wells are those that do not have to obtain an actual piece of paper for a water right. In his opinion, it would be appropriate to look at the current system of exempting them from the permitting process, to look at the limits they are allowed to use and to look at a mechanism under which domestic well owners pay an appropriate, fair and equitable share of the cost because they do benefit to some extent.

In response to a question regarding the water master issue from **Senator Andreason**, **Director Dreher** explained that water administration rules were promulgated in 1993 pursuant to the administrative procedures act. These rules were promulgated to regulate how surface and ground water rights are administered. One of the provisions of those rules is the requirement that during times of shortage the senior water right holders have the ability to give notice to the junior priority ground water right holders that they have to provide mitigation. That provision has never been exercised until this year. **Director Dreher** then commented on a situation in the Big Lost Basin.

Representative Stevenson made a motion that the committee authorize the Director to proceed with the RFP after it has been reviewed and approved by the Governor to expedite the process of finding the extent of water that might be available for sale. **Senator Cameron** seconded the motion.

The motion carried unanimously on a voice vote.

Representative Stevenson said that the RFP allows the state to see if people are interested in selling water, it does not commit any price and doesn't force people to do it. It simply allows the state to move forward to see if there is interest in the idea. Without an RFP, there is no substance. The RFP puts something in writing that puts the terms and conditions out there so people can understand them.

Senator Cameron added that it was his understanding that the RFP was drafted in such a manner that it will identify willing sellers and what they are willing to sell their water for. This provides the state with an inventory and a determination can then be made, based on where the water is located and the price, whether or not

the program is feasible. This, in his opinion, has to be the first step to determining whether or not the state can proceed.

Director Dreher added that there is a specific provision in the RFP that says the state reserves the right to reject any and all proposals for any reason. So there is absolutely nothing in it that binds the state. It is simply a mechanism to see how much interest is out there and what the cost might be. These applications will be confidential.

In response to a question from **Senator Calabretta**, **Director Dreher** said that a time frame for completing and returning applications has not been entered into the RFP at this time but he is assuming it will be 30 days. They would actually like to have the bids evaluated before the legislative session starts to see if there is enough interest to proceed. **Director Dreher** noted that the RFP will also include an option for the state to buy water that would lock the water up at that price for a period of time. The option is in the form of a one year lease equal to 10% of the price offered.

Michael Bogert was the next speaker and addressed the Committee regarding the progress of the Nez Perce Agreement in Congress. He explained that Senator Craig, Senator Crapo and their staffs have done a great job in moving the legislation through, not only the hearing process but also markup. On September 22, 2004, after many negotiations during the summer recess, an amendment in the form of a substitute for markup was put forward. The bill had changed from its introduction in three respects. The first was technical in nature and involved cleaning up references to the title and references to definitions. There was much focus in the discussions on exactly what the legislation did with the agreement and what the intentions of the parties were vis a vis any other law such as the Endangered Species Act. After much discussion in the Indian Affairs Committee, language was developed that protects the integrity of the agreement and provides ESA and Clean Water Act protection. On September 22, 2004, the Senate Indian Affairs Committee unanimously voted to support the bill as negotiated and marked up.

Mr. Bogert said that there has been great concern from the conservation community about the structure of the bill and the structure of the agreement. In good faith, he and Clive Strong met with some of these groups and ultimately the Idaho conservation community left the negotiations to the Idaho delegation and to the Indian Affairs Committee staff. In his opinion, a decent compromise was reached on the issue of whether or not Idaho's interest is protected regarding ESA issues.

Mr. Bogert explained that on the evening of October 7, 2004, after much discussion with the state delegation and with some of the other senate staff, the

Indian Affairs Committee report was filed. At that point, with discussions between Democrats and Republicans on the Indian Affairs Committee, it was understood that the bill was free and clear by both sides for unanimous consent consideration on the floor of the U.S. Senate by the next day. Unfortunately, from Friday through the weekend there was an internal disagreement that turned out to be very partisan on the floor of the Senate and all business was shut down. By Monday, when the Senate adjourned, the bill had not been considered. He noted that many other bills that had received similar unanimous consent clearance in the Indian Affairs Committee, had also not been taken up. After discussions with the delegation staff and the tribe, they are trying to discover what difficulties existed to prevent the bill from being considered.

Mr. Bogert said that a meeting is being held tomorrow with the Idaho stakeholders because it is believed that the lame duck session of Congress will begin on November 16, 2004, after the election. It is his due diligence with the parties, including the Tribe, to try to get the bill through Congress and to the President's desk after the election. The parties are still committed to the agreement and he will do all he can to make sure it gets through.

Mr. Bogert commented that key staff members on the House side of Congress have been briefed regarding this bill. Several trips have been made to Washington, D.C. to participate in other discussions and Representative Otter and Representative Simpson are aware that if the bill succeeds in the Senate, it will be coming their way. Some of the committee staff of the committees with jurisdiction over the matter have been to Idaho and talked at length with the parties involved and they understand how important this legislation is to the stakeholders, the water users and to the Tribe. He said that it would be very useful in the next few weeks that if legislators or their constituents have questions about the agreement, he and Clive Strong would be more than happy to try to answer those questions.

Senator Stegner asked what **Mr. Bogert's** role will be with the state given the fact he is no longer working in the Governor's office. **Mr. Bogert** explained that the Governor has asked him to continue on this matter and to work with the Committee and the Legislature for the foreseeable future.

Representative Langford asked whether the Nez Perce Agreement has ramifications that might extend to other watershed groups and create a precedent that would have long term implications for other watersheds in Idaho or in other states. **Mr. Bogert** said that the agreement has been touted in Idaho as doing things that are not being done elsewhere in the nation. In his opinion, it is important to understand that the agreement is ultimately a framework by which outstanding claims and litigation within the SRBA watershed and the Tribe's claims to a significant number of water rights within Idaho streams and tributaries are being resolved. **Mr. Bogert**

explained further that the agreement settles a discreet piece of litigation within the overall adjudication within the Snake River Basin. To the extent there are watersheds outside the SRBA that are not part of this adjudication, they are not impacted by the settlement. He noted that it is believed that some of the concepts and agreements, such as the forestry program that deals with ESA issues, will be equally applicable to other areas of the state where problems exist.

Representative Langford said that there are officials in Bear Lake County that concerned that the agreement will set a precedent that will provide the Sho-Ban Tribe the opportunity to make water claims on the Bear River. **Mr. Strong** explained that the state has entered into an agreement with the Shoshone -Bannock Tribe that solves all of their in-stream flow claims and consumptive use claims within the SRBA. There is an offshoot of the Shoshone-Bannock Tribe that created a small area of trust lands in the Bear Lake area and Southern Utah and the agreement that was reached solved all of the claims under the Fort Bridger Treaty. In his opinion, the Nez Perce Agreement does not create any precedent in the Bear Lake area.

Representative Stevenson reported that the Mountain Home Working Group met October 13, 2004. The working group heard a report from Norm Semanko concerning the Nez Perce Agreement and an update from Wayne Hammon on the CREP program. **Representative Stevenson** said that the group plans to meet with the commander of the Mountain Home Air Force Base to let them know what is happening and the effects that the water issues may have on the future growth of the Air Force Base.

Representative Meyer reported that the North Idaho Working Group met in Moscow on October 1, 2004. At that meeting a wish list was developed for funding recommendations relating to a number of different projects:

The Clark Fork, Pend Oreille, Kootenai, Moyie and Priest River Basins:

1. Establish \$102,000 in funding for data base development and collection of water monitoring data for Pend Oreille and Clark Fork rivers. Including \$60,000 one time funding for the development of a database to compile in one place studies done on Pend Oreille lake on water quality and water quantity issues and to identify gaps in baseline data and \$42,000 for water quality monitoring to establish base conditions prior to the development and operation of the Rock Creek Mine in Montana.
2. \$50,000 one time money to the Kootenai Resource Initiative to supplement funding for collecting and analyzing data related to reservoir operation effects on white sturgeon and to develop baseline data for water quality and water quantity issues on the Moyie and Kootenai Rivers.

3. The Pend Oreille and Priest Lake Commission has existed for two years with no state funding. The Northern Basins Work Group recommends \$150,000 in start up funding for an executive director, office space and operating expenses.

4. Legislature should provide funding for a study of Pend Oreille Lake level/operation on ground water recharge to the Rathdrum Aquifer. Pend Oreille is at the upper end of the Rathdrum Aquifer and changes to the operation of the lake level may have an effect on the amount of water recharged to the Rathdrum Aquifer. A study is needed to quantify the degree of interconnection between the lake and the aquifer and how lake level changes would affect the aquifer (funding amount not identified at this time).

Coeur d' Alene, Spokane and Rathdrum:

1. Idaho is currently engaged in a collaborative study of the Rathdrum Aquifer with the State of Washington and the U.S. Geological Survey. The study resulted from concerns in Washington and Idaho of the long-term viability of the ground water and interconnected surface waters of the Rathdrum Aquifer and Spokane River including interstate water delivery issues. The State of Washington committed \$100,000 last year to this study and \$500,000 of federal funding was also secured and is being used for the first year of a multi-year study effort. The Work Group recommends that Idaho contribute \$150,000 a year for the next two years to support the study effort and encourages continued funding for future monitoring, measurement and modeling.

2. Establish and designate an Idaho/Washington organization that will coordinate and collaborate on cross-border water management issues. The organization will work with state water management agencies, local governments and other stakeholders to facilitate cooperation and information exchange. A base level funding of \$50,000 a year is proposed.

3. Adoption of the recommendation of the Rathdrum Ground Water Management Plan advisory committee, copies of which were provided to the Committee. A copy is maintained in the Legislative Services Office. Recommendations include commencement of water right adjudication for the Coeur d'Alene basin.

4. Additional funding for water quality monitoring for the Department of Environmental Quality.

Palouse:

1. Adopt project proposals from Palouse Basin Aquifer Committee (PBAC),

copies of which were provided to the Committee. A copy is maintained in the Legislative Services Office. The Work Group recommends funding the first two priority projects for Monitoring Well Fields Nos. 2 and 3 and Pilot Passive Recharge Well included in the PBAC proposal which total \$474, 000 for fiscal year 2006. The remaining three projects; Pilot Infiltration Basin or Combined Wetlands/Recharge Basin, Aquifer Model Development, Pilot Surface Catchment Project that total \$488,000, should be funded as soon as possible.

2. Commence a general adjudication of water rights in the Palouse basin only if supported by the local community.

Clearwater and Salmon:

1. Legislative support including letters from legislative leadership for dredging and other projects to keep the Port of Lewiston operable for shipping. Also letters supporting the continued maintenance and operation of the Lower Snake River dams for clean hydropower production and shipping operation.
2. No need for additional minimum streamflows or protection is necessary for the Selway, Lochsa, Salmon and Little Salmon rivers. If the proposed settlement of Nez Perce tribal claims in the Snake River Basin Adjudication is not approved, then the state should evaluate whether additional protection or regulation is needed.
3. Legislature should oppose the potential listing of North Fork Clearwater rainbow trout as a threatened species requiring protection under the Endangered Species Act.
4. State should seek greater control of Dworshak Reservoir so the water resource could be used for the benefit of Idaho citizens rather than the federal government.

General Recommendation:

1. Additional funding into the IDAHO DEPARTMENT OF WATER RESOURCES budget to monitor, measure, collect and analyze surface and ground water data in the northern basins particularly in areas with on-going concerns. Recommend \$250,000 per year, of which \$150,000 for FY06 and FY07 will be dedicated to support the Spokane Valley-Rathdrum Prairie Hydrologic Project.
2. Move forward to adjudicate the remaining basins in the state that were not completed in the Snake River Basin adjudication. This should be accomplished by basin based upon support from the local community. At this time an adjudication is not supported for the Palouse and Potlatch basins, but a public process will be implemented to determine if there is support for an adjudication.

3. Establish an organization to coordinate and facilitate cross-border water resource management. Organization should focus on collaboration and information exchange for water resource issues between Idaho and Washington. The goal should be to provide a forum to educate and inform the community as well as provide recommendations to state water management agencies.

Representative Meyer explained that on December 11, 2002, the Director of the Idaho Department of Water Resources designated the Rathdrum Prairie Ground Water Management Area (RPGWMA). The area was established to protect the ground water resources and users of the Rathdrum Prairie-Spokane Valley Aquifer within the State of Idaho. In Idaho, the Aquifer is located in parts of Kootenai and Bonner counties and lies under more than 200 square miles of land.

Ground water resources in the aquifer supply much of the drinking water, irrigation, recreation, commercial, and industrial needs of the Rathdrum Prairie area. Careful management of the ground water supply is essential for the long-term economic vitality of the local and regional community.

A key component of the Director's Order is the development of a Ground Water Management Plan that balances the goals of protecting existing water users and maximizing the public benefit of the ground water resource. The Plan strives to create the tools to administer ground water resources now and in the future. The Plan attempts to balance protection of existing uses and the quality of the ground water resource while allowing for future development and encouraging water conservation.

Following **Representative Meyer's** presentation, **Representative Langford** was introduced to present the report for the Bear River Working Group. She explained that although the current drought has caused shortages in the Bear River drainage, there have been few serious challenges in managing Bear River's water. This is largely due to the 1995 Bear Lake Settlement Agreement.

Representative Langford went on to say that because ground water and surface water are interrelated and one impacts the other, the focus of this report will be largely on surface water and its impact on the economy of the Bear River drainage. She went on to explain the long term history of the pivotal role Bear Lake plays in the Bear River drainage and stated that when white men discovered the Bear Lake Valley, Bear River and Bear Lake were not connected except that the outflow from Bear Lake's two natural outlets flowed into Bear River. There was no inflow of Bear River water into Bear Lake. More complete history is available in the Bear River Report of October 14, 2004, a copy of which is maintained in the Legislative Services Office.

Representative Langford noted that in order to settle a lawsuit in the 1970s, Utah Power was ordered to keep Bear River within its banks. Without public input, Utah Power determined that to accomplish this water would have to be released from Bear Lake in the fall of the year to make room for the spring runoff. The release is done whenever the elevation of Bear Lake is above 5,918 feet above sea level at the close of the irrigation season. During such releases and during the following winters, the run of the river is sent downstream along with the surface water removed from Bear Lake. Had no releases occurred in the 1990s, the elevation of Bear Lake would be more than four feet higher than it is now. All of this water finds its way to the Great Salt Lake where the principle beneficiary is the Great Salt Lake ecosystem.

Representative Langford said that the important role of the Bear River Compact and the 1995 Bear Lake Settlement Agreement are apparent. Under the Compact, Woodruff Narrows Reservoir in the Upper Division is not allowed to fill whenever the elevation of Bear Lake is below 5,911 feet above sea level, affecting both ground and surface water in the area. When Woodruff Narrows Reservoir is not full, no water is available for irrigation in the ten mile stretch of river between Pixley Dam and Cokeville, Wyoming, in the central division. Irrigators in that area have no water for their crops. Because of this, it is apparent that lowering the elevation of Bear Lake, which is in the Lower Division, impacts water users in the Upper and Central Divisions.

According to terms of the Settlement Agreement, when Bear Lake is at or above 5,914 feet in elevation as of March 1, 245,000 acre feet of water may be released, if needed, for irrigation that year. As the elevation of Bear Lake goes down, releases for irrigation take place on a diminishing scale down to elevation 5,904 when only 55,000 acre feet of water may be released that year. In the event Bear Lake reaches 5,904 elevation or below, no water will be allocated. Based on that formula, unless the elevation of Bear Lake rises between now and March 1, no water will be released during the 2005 irrigation season. According to

Representative Langford, this shows that lowering the elevation of Bear Lake in the Idaho portion of the Lower Division impacts water users in both Idaho and Utah and that releasing water from Bear Lake for flood control adversely impacts the economy of the entire region.

Representative Langford noted that flood control above Bear Lake would make possible to institute a policy that Bear Lake would be “first to fill and last to empty.” Benefits would include:

- More water for irrigation - keeping the elevation of Bear lake above 5,914 feet above sea level would guarantee a release of 245,000 acre feet of water, if needed, every year downstream for irrigation.

- Minimize fluctuation of lake levels - 80% of the rocky area where many of Bear Lake's endemic species spawn is lost when the lake is low. Lowered lake levels encourage infestation of undesirable plant growth along the lake.
- Improved spawning habitat for Bear Lake Cutthroat Trout - Wide expanses of exposed beach leave spawners vulnerable to predators. In 2004, no fish were able to make their way upstream to spawn from the Idaho portion of Bear Lake.
- Boat-launching capability at Idaho State Parks - For the past three years no boats could launch in the Idaho portion of Bear Lake. This caused a 50% drop in visitors, negatively impacting revenue to the parks and to the local economy.
- Allow filling of Woodruff Narrows Reservoir - The Bear River Compact allows this reservoir to fill only when the elevation of Bear Lake is above 5,911 feet above sea level.

Representative Langford stated that flood control above Bear Lake will greatly benefit all three states in the Bear River drainage - Utah, Wyoming and Idaho. In her opinion, the state must include its sister states in efforts to achieve this goal. Recent meetings with congressional staffers have included invitations to the congressional delegations of Wyoming and Utah.

Representative Langford said that the U.S. Army Corp of Engineers has indicated a willingness to conduct a feasibility study that will answer some questions. Costs of the study range from \$600,000 to \$2 million depending on whether the study would include the area immediately above Bear Lake, the Rocky Point site, or a basin wide study. Studies of this sort require a 50/50 match. With congressional approval, past local expenditures may be used as part of the local match. The Bear Lake Regional Commission has spent over \$4 million in state and local funds for studies of Bear Lake and Bear River over the last 34 years. Concerned citizens of the Bear River drainage, including Bear Lake County Commissioners, the Bear Lake Regional Commission, Lake Watch, Inc., and Love Bear Lake, Inc., are asking for congressional approval for use of part of those past expenditures as the local match to make the Corps of Engineers feasibility study possible.

Representative Langford said that in view of the above, she would ask for a motion from this committee recommending that the Legislature of the State of Idaho send a concurrent resolution to Congress asking that legislation be introduced in the United States Congress that will allow the U.S. Corps of Engineers feasibility study of the benefits of flood control above Bear Lake and that past local expenditures be

allowed for the 50% local match. **Representative Langford** will have Legislative Services draft a resolution for consideration by the Committee for the next meeting.

Representative Langford's complete report is available at the Legislative Services Office.

Norm Semanko, Idaho Water Users Association spoke to the committee regarding the American Rivers vs NOAA Fisheries and the Bureau of Reclamation lawsuit as well as the National Wildlife Federation lawsuit.

Mr. Semanko explained that the American Rivers lawsuit was filed by several environmental and fishing groups regarding operation of the Bureau of Reclamation's Upper Snake River Basin projects located in Idaho and Eastern Oregon. These are projects that have an active storage capacity of about 7 million acre feet above Hells Canyon. A complaint was filed on January 16, in the federal district court in Oregon and was assigned to Judge Redden, the same judge who presides over the National Wildlife Federation case that deals with the Lower Snake and Columbia river dams. This complaint was filed by five environmental and fishing advocacy groups including American Rivers, Idaho Rivers United, National Wildlife Federation, the Pacific Coast Federation of Fishermens Association and the Institute for Fisheries Resources. The defendants are NOAA Fisheries and the Bureau of Reclamation. The federal government filed an answer denying all of the allegations on April 14, 2004. The State of Idaho, consistent with the legislatures resolution in opposition to the lawsuit, was granted intervention in the lawsuit. Other interests including the Idaho Water Users Association were also granted intervention and filed their own answers to the complaint.

Mr. Semanko stated that in their complaint, the environmental and fishing advocacy groups are arguing that the biological opinion for the Bureau's projects in the Upper Snake River Basin issued by NOAA is illegal and should be set aside. The current biological opinion was issued in 2001 and was renewed in 2002 and expires on March 31 of 2005. The groups want the court to order that the Upper Snake projects be included in the biological opinion that is being developed for the downstream federal Columbia River power system dams. This argument was rejected by Judge Redden in an order issued on December 17, 2003, in the downstream case but he allowed the groups to resurrect the argument in the new lawsuit focusing on the Upper Snake projects. The groups claim that operation of the Upper Snake projects will both kill and injure juvenile and adult salmon through alteration of the hydrograph of the Snake and Columbia Rivers, reducing and shifting the timing river flows and altering water quality and quantity. Specific allegations include that depletions from the project affect flows and water quality in the Lower Snake River and in the Columbia River below the confluence of the

Snake.

The groups specifically allege that the amount of water currently sent downstream for flow augmentation (427,000 acre feet) is not sufficient to meet downstream flow targets established by NOAA Fisheries for spring and summer periods at Lower Granite on the Lower Snake River and at McNary on the Lower Columbia River. According to their complaint, management of the Upper Snake projects have a “substantial impact on whether and to what extent those targets are achieved.” They further allege that NOAA Fisheries failed to determine the amount of flow augmentation needed to meet downstream flow objectives. Specifically, they claim that NOAA Fisheries has violated the law through reliance on an unspecified and minimal amount of flow augmentation that it knew would not satisfy flow targets.

Mr. Semanko said that looking at the hydrology of the matter, if the court were to agree with the environmental groups and order the release of water from the Bureau projects sufficient to meet the downstream flow targets, the reservoirs would be depleted. This has not been resolved by the court.

Mr. Semanko continued that on May 19, the environmental and fishing advocacy groups filed a motion for summary judgment seeking the following:

1. An order from the court finding that the Upper Snake biological opinion and the FCRBS biological opinion have been improperly segmented and should be joined into one comprehensive biological opinion.
2. Arguing that there has been improper alliance on the same measures for mitigation that existed with the downstream dams that resulted in Judge Redden’s May 7, 2003, opinion striking down the biological opinion and remanding it in the FCRBS case.
3. A finding that there has been an improper jeopardy analysis done with regard to the Upper Snake River projects.

The parties agreed to a briefing schedule that was dictated by a federal motion to dismiss based on the fact that the biological opinion that is currently in place has nearly expired and has, in fact, lived out its useful life now that irrigation season is ending. The defendant interveners, including the State of Idaho and the water user groups supported this, the environmental groups opposed it, and the judge denied that motion to stay. There has been a tentative agreement to response briefs to the summary judgment motions by the state, the water users and the federal defendants by November 3, 2004. December 3, 2004 is the deadline for the rebuttal brief by the environmental groups.

Mr. Semanko noted that they are aware that the Bureau of Reclamation is in the process of preparing a biological assessment in view of a new biological opinion for the Upper Snake River projects with a deadline of March 31, 2005, from NOAA Fisheries and the National Marine Fisheries Services and also from the U.S. Fish and Wildlife Service.

Mr. Semanko stated that regarding the FCRBS case, the biological opinion was remanded to the agencies to be redone and a draft has been circulated to the state agencies and the Tribes. The comment period expired on October 8, 2004 and a number of comments were submitted. The agency has until November 30 to finalize their new biological opinion. After that, the parties will decide when and how to litigate remaining issues.

Senator Noh said that it would seem that the state's best interest in the NOAA Fisheries case would have been better served if Judge Redden has accepted the federal motion to dismiss. **Mr. Semanko** said that was correct.

Senator Noh said that he heard that this lawsuit entangles the Nez Perce Agreement into the court proceedings and asked whether that was valid. **Mr. Semanko** stated that it has been mentioned in the litigation in at least two ways. The first was with the motion for summary judgment in May. One of the arguments was that the other Snake biological opinion relies on the same speculative, not certain to occur, non-federal activities that the lower projects did. They said, in addition, it also relies on a not yet complete SRBA process and in providing information to the court, a copy of the term sheet was appended. The second way the agreement has been brought into the process is with regard to the motion to stay. The federal government appropriately argued that the new biological opinion will necessarily be different than the existing ones because it will stem from the flow from the term sheet.

In closing comments, **Representative Raybould** stated that Mr. Strong is working on getting economists to thoroughly analyze the economic impact of what will happen if nothing is done to solve this issue and water calls are made. This impact will be, not only to the general fund, but to the entire state, counties and school systems and to all things that depend on property taxes to support them. In his opinion, it is important that all areas of the state be informed that this issue affects the entire state, not just the Eastern Snake Plain area. They hope to have this information available by the next meeting.

The meeting was adjourned at 4:00 p.m.